No. 43834-8-II
COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

WILLIE E. YOUNG,

Respondent,

v.

MICHAEL A. CALLAHAM, et ux,

Appellants.

BRIEF OF RESPONDENT

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A. INTRODUCTION

This appeal involves a claim by the appellants, Michael and Dixie Callaham, that they adversely possessed an 11-foot strip of land that runs along the eastern edge of respondent Willie Young's residential property. The trial court, after hearing all the evidence, concluded that the Callahams had failed to show that they acquired title by adverse possession. The Callahams brought this appeal, assigning error to two conclusions of law. The Callahams do not assign error to any of the trial court's findings of fact.

B. ISSUES ON APPEAL

The Callahams assign error to two conclusions of law entered by the trial court: (1) that the Callahams failed to show that they have acquired title by adverse possession (CP 330 (conclusion of law no. C.1)); and (2) that Young is the true title owner of the disputed land (CP 330 (conclusion of law no. B.1)). App. Brief, p. 2.

The Callahams identify three issues pertaining to the assignments of error. They frame the issues, however, in terms that obscure the applicable standard of review. Moreover, they do not present any argument in their brief in support the second assignment of error and the corresponding issue (issue no. 3). The issues should be reframed as follows:

1. By failing to address their third issue (i.e., whether the trial court err when it ruled as a matter of law that Willie E. Young was the true title owner of the disputed land), have the Callahams waived the second assignment of error?

2. Did the trial court err as a matter of law when it based its conclusion of law no. C.1 (i.e., that the Callahams failed to show that they had acquired title by adverse possession) on its reasoning that the Callahams failed to provide evidence that they maintained or used the property in the manner of a residential back yard?

3. Is the trial court's conclusion of law no. C.1 supported by the court's findings of fact, insofar as the court's conclusion was based on its reasoning that such use of the disputed property as the Callahams provided evidence has been non-contiguous and irregular?

4. If the trial court erred with respect to the two preceding issues, was it harmless error insofar as the trial court's conclusion of law no. C.1 was based on the fact that the fence was not a boundary fence, an issue not raised by the Callahams on appeal?

5. Should the trial court's conclusion of law no. C.1 be affirmed based on the Callahams' failure to establish hostility as evidenced by their 2010 offer to purchase the disputed land from Mrs. Young?

C. STATEMENT OF THE CASE[1]

Since approximately 1970, Mrs. Young has owned her home at 1124 121st East Street, Tacoma, Washington 98445. CP 325 (finding of fact no. 1). On both the eastern and western sides of Mrs. Young's property were vacant lots. CP 326-27 (finding of fact nos. 3 and 6). There was a fence located approximately 11 feet inside her eastern property line. CP 326 (finding of fact nos. 4 and 5). There was no fence along her western property line. CP 327 (finding of fact no. 6).

Some time before 1990 (when, as discussed below, the Callahams purchased their home), Mrs. Young had her son Kenneth replace the fence that was located 11 feet from her eastern property line. CP 326 (finding of fact nos. 4 and 5); VRP p. 26, lines 3-5. Kenneth built the new fence in the same location as the old fence, approximately 11 feet inside Mrs. Young's eastern property line. Mrs. Young knew that the fence was 11 feet inside her property line. She had been told by the previous owners that there was a well on the other side of the fence, and she saw a hole that she believed was the well about which she had been warned. Mrs. Young had the fence rebuilt in the same location as the old fence because she did not want her children and grandchildren playing in this area that she

[1] A copy of the trial court's findings of fact and conclusions of law is attached at Appendix A.

considered to be hazardous. The Callahams admit that they have no knowledge of the origins of the fence, why it was built, or why it was located 11 feet inside Mrs. Young's property line. CP 326-27 (finding of fact no. 5).

Over the years, Mrs. Young occasionally would throw grass clippings and other yard waste over the fence onto her property located east of the fence. From time to time, she would also pick blackberries from bushes growing up on either side of the fence. Although there were blackberry bushes growing over much of the vacant lot, Mrs. Young did not pick berries other than those located on her property next to the fence. CP 327 (finding of fact no. 7).

In 1990, the Callahams purchased their home at 1135 122nd Street East, Tacoma, Washington 98445. CP 325-26 (finding of fact no. 2). In 1997, the Callahams purchased a vacant parcel of land north of and adjacent to their home. This property is east of and adjacent to Mrs. Young's property. CP 326 (finding of fact no. 3). The Callahams planned to build a house on the vacant lot. In 1998, they cleared the lot of shrubbery, installed a culvert over a ditch running along the north side of the property and laid quarry spalls over the culvert. A portion of the culvert and quarry spalls, and possibly some of the shrubbery, was located on the 11-foot strip of land east of the fence belonging to Mrs. Young. CP

327 (finding of fact no. 8). In 2001, 2002 and 2003, the Callahams conducted percolation tests on the vacant lot. CP 327-28 (finding of fact no. 9); Exhibits 11 and 12. The tests conducted in 2003 may have included up to three perc holes dug on the 11-foot strip of land. The vacant lot failed the percolation tests; thereafter, the Callahams' intent was to use the vacant lot as an extension of their back yard. CP 328 (finding of fact no. 9).

Seven years later, in July 2010, the Callahams again cleared the vacant lot of shrubbery. They also laid a gravel driveway onto the property from 121st Street East Street, and began work on a perimeter fence around the lot. In the course of this work, the Callahams' contractor accidentally knocked down a portion of Mrs. Young's fence located 11 feet inside her eastern property line. When this happened, Mr. Callaham asked Mrs. Young for permission to replace her fence, to which she agreed. Accordingly, the fence was replaced. CP 328 (finding of fact no. 11). Shortly thereafter, Mrs. Young's daughter, Kimberly, told Mr. Callaham that her mother wanted the fence moved to the property line. Mr. Callaham refused to do this, but offered to pay Mrs. Young $2,000 to $2,500 for the 11 feet east of the fence line. CP 329 (finding of fact no. 13).

There is no physical or documentary evidence that the Callahams

used the disputed 11-foot strip of land, or the vacant lot, for any purpose during the seven-year period from the 2003 perc tests and the work conducted in July 2010. Satellite photographs in 2005, 2007, 2009 and June 2010 show vegetation growing throughout the vacant lot, and do not show any structures, equipment, vehicles or evidence of any human activity. CP 328 (finding of fact no. 10).

D. SUMMARY OF ARGUMENT

The trial court found that in the 13 year period from the Callahams' purchase of the vacant lot in 1997 to the day in July 2010 when they knocked down and replaced Mrs. Young's fence, there were two occasions when they actually (or possibly) conducted activity on the disputed land. The first was in 1998, when they installed a culvert, and possibly cleared shrubbery, in part on the disputed land. The second was in 2003, when they dug perc holes, three of which may have been on the disputed land. Nothing more. Therefore, the trial court concluded that the Callahams had not shown that they had acquired title to the disputed land by adverse possession. The trial court's findings support its conclusion, and this Court should affirm.

E. ARGUMENT

1. BY FAILING TO ADDRESS THE ISSUE OF WHETHER THE TRIAL COURT ERRED WHEN IT RULED THAT MRS. YOUNG IS THE TRUE TITLE OWNER OF THE DISPUTED LAND, THE CALLAHAMS WAIVED THE SECOND ASSIGNMENT OF ERROR

The Callahams assign error to the trial court's conclusion of law no. B.1, that Mrs. Young is the true title owner of the disputed land. App. Brief, p. 2. As the heading to conclusion of law no. B.1 indicates, it relates to Mrs. Young's claim to quiet title. To support her claim, Mrs. Young was required to show her title or right of possession. *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works*, 48 Wash. 574, 577, 94 P. 110 (1908) (ejectment action). The court's conclusion of law confirms that she succeeded in making the required showing. Conclusion of law no. B.1 does not deal with the Callahams' adverse possession counterclaim. Even though Mrs. Young is, as the trial court concluded, the true title owner of the disputed land, had the Callahams successfully proved their adverse possession claim, they would have a new and superior claim of title to the land. As Professor Stoebuck notes, title by adverse possession "is a new, original one; it is not acquired through or from the disseised owner but by extinguishing that one's title." WILLIAM B. STOEBUCK AND JOHN W. WEAVER, 17 WASH. PRAC.: REAL ESTATE: PROPERTY LAW § 8.6 (2nd ed. 2004).

Although the Callahams assign error to the trial court's conclusion of law, they present no argument and cite no authority to support this assignment of error. A party who assigns error to a portion of the trial court's decision, but who presents no argument in the opening brief with respect to the claimed assignment, waives the assignment of error. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Likewise, a failure to cite legal authority bearing on the issue waives the assignment of error. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). Therefore, the Callahams have waived the second assignment of error.

2. THE TRIAL COURT PROPERLY BASED ITS ANALYSIS OF THE CALLAHAMS' ADVERSE POSSESSION CLAIM ON WHETHER THE CALLAHAMS' USE OF THE LAND WAS IN THE MANNER OF A TRUE OWNER OF RESIDENTIAL PROPERTY

One claiming title by adverse possession must show "possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile." *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989) (citations omitted). The claimant must prove that each element "concurrently exist[ed]" over a period of 10 years. *Chaplin v. Sanders*, 100 Wn.2d 853, 858, 676 P.2d 431 (1984). As the Callahams acknowledge:

> [W]hat constitutes possession or occupancy of property for

> purposes of adverse possession necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied. In this vein, we have accepted the view that the necessary occupancy and use of the property involved need only be of the character that a true owner would assert in view of its nature and location.

Frolund v. Frankland, 71 Wn.2d 812, 817, 431 P.2d 188 (1967), overruled on other grounds by *Chaplin v. Sanders*, 100 Wn.2d at 861, n. 2. App. Brief, p. 10.

Here, the trial court entered findings that the vacant lot was adjacent to both the residential properties of both Mrs. Young and the Callahams; that the Callahams purchased the vacant lot with the intention of building a house on the property; and that when the property failed percolation tests, the Callahams' intent was to use the property as an extension of their back yard. CP 326-28 (finding of fact nos. 3, 8 and 9). The Callahams do not assign error to these findings; therefore, they are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 808.

The trial court then analyzed the Callahams' adverse possession claim in the context of the residential nature, character and locality of the property, as well as the Callahams' own intended use of the property as an extension of their back yard. In this light, the trial court concluded that the Callahams had not shown adverse possession because, for one thing, they

did not provide evidence of having maintained or used the property in the fashion of a residential back yard. CP 330 (conclusion of law no. C.1). Indeed, the trial court found that for seven years there is no documentary or physical evidence that the Callahams "used the vacant lot – or, in particular the 11 feet of the vacant lot that is east of Young's fence – for any purpose ...." CP 328 (finding of fact no. 10).

In their brief, the Callahams appear first to argue, yes we did!, as where they say:

> Testimony was given by Mr. Callaham, Mrs. Callaham, and their 21 year old daughter, Caty Callaham to the effect that during their possession of the disputed property, the Callahams routinely used the subject property to access the property via the approach they built on the disputed land, to periodically park trailers on the disputed land, that their kids would play on the disputed land, and that the family would pick berries on the disputed land.

App. Brief, p. 12. The problem with this argument is that the trial court did not adopt any finding of fact accepting such testimony. In effect, the Callahams are asking this Court to weigh the evidence presented to the trial court and decide for itself whether or not they used the disputed land as would the true owner of a residential back yard. But, as this Court has noted: "This court cannot add to a trial court's findings of fact merely because a fact was testified to and was not directly contradicted by another witness." *Heriot v. Lewis*, 35 Wn.App. 496, 502, 668 P.2d 589 (1983).

The Callahams then turn to the argument that the trial court should not have looked beyond the fact that "the property in question was vacant land that periodically would be overgrown with blackberry vines ...." App. Brief, pp. 13-14. They rely on *Heriot v. Lewis*, which they claim is "a very similar case (dealing with a vacant lot and blackberry vines) ...." App. Brief, p. 14. But *Heriot v. Lewis* does not support the Callahams' position. In *Heriot v. Lewis*, the trial court held that the Lewises, who claimed adverse possession of overgrown land at the edge of their property, had not had actual possession of the disputed land. *Heriot v. Lewis*, 35 Wn.App. at 501. The court of appeals reversed. Although noting that "a rightful owner might very well make little active use of such property", the court emphasized that "the one distinctive act of dominion and control that a true owner could assert over such property is to exclude others." *Id.* at 505. In this regard, it held that the Lewises (through their predecessor Gunderson) had exercised such dominion and control:

> On two occasions Heriot encroached upon the land claimed by Mrs. Gunderson by setting posts in the ground east of the old fence line. On both occasions his posts were swiftly removed. The ejectment of intruders is an act both characteristic and indicative of the dominion and control a true owner might exercise over the property, considering its nature and location.

Id. There is no finding that the Callahams did anything to exclude Mrs. Young from the disputed land. Indeed, just the opposite. The trial court

found that Mrs. Young picked blackberries on both sides of the fence, and that she threw yard waste onto the disputed land. CP 327 (finding of fact no. 7). It is may be that a rightful owner might tolerate a neighbor picking blackberries from the property as a "neighborly accommodation." But to allow someone to dispose of yard waste on the land is not consistent with possessing the land in the manner of a true owner.

3. THE TRIAL COURT'S CONCLUSION OF LAW THAT THE CALLAHAMS FAILED TO SHOW ADVERSE POSSESSION IN PART BECAUSE THEIR USE OF THE DISPUTED LAND WAS NON-CONTINOUS AND IRREGULAR IS SUPPORTED BY THE FINDINGS OF FACT

Where, as here, the appellant has not challenged the findings of fact, "review is limited to determining whether the findings support the trial court's conclusions." *Courchaine v. Commonwealth Land Title Ins. Co.*, No. 30020-0-III slip op. 5 (Wash. Ct. App. Dec. 13, 2012), citing *Fenton* v. *Contemporary Dev. Co., Inc.* 12 Wn. App. 345, 347, 529 P.2d 883 (1974) (ordered published Mar. 12, 2013).

An element of adverse possession that the Callahams were required to show is that their possession of the disputed land was uninterrupted for the statutory period. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d at 757. The trial court, in explaining why it concluded that the Callahams had failed to establish adverse possession, stated that "such use

of the property as they have provided evidence has been non-contiguous and irregular." CP 330 (conclusion of law no. C.1). This is supported by the trial court's findings that in the 13 years the Callahams owned the vacant lot before knocking down and replacing Mrs. Young's fence in 2010, there were only two occasions when they may have done work on the disputed land, in 1998 and in 2003. CP 327-28 (finding of fact nos. 8, 9 and 10).

The trial court found that in 1998, the year after the Callahams purchased the vacant lot, they hired a contractor to clear shrubbery, install a culvert and lay quarry spalls; some of which work was on the disputed land. CP 327 (finding of fact no. 8). It found that about five years later, in 2003, the Callahams conducted percolation tests on the vacant lot, and that Mr. Callaham believes some of the perc holes that year were on the disputed land. CP 327-28 (finding of fact no. 9). After that, the trial court found that there were no photographs, or other physical or documentary evidence, that the Callahams used the disputed land for any purpose until they removed Young's fence in 2010. CP 328 (finding of fact no. 10). These findings support its conclusion that the Callahams failed to establish adverse possession because their use of the property was non-continuous and irregular.

In their brief, the Callahams claim that they had actual and

uninterrupted possession of the disputed 11-foot strip of land for more than ten years. App. Brief, p. 10. But they offer nothing to support this claim. They argue that their actual possession began in 1997 when they purchased the vacant lot. App. Brief, p. 10. But there is nothing in the record to indicate that they engaged in any activity that affected the disputed land until the following year, 1998, when they installed a culvert, and possibly cleared shrubbery, partly on the disputed land. CP 327 (finding of fact no. 8). They refer to the perc tests conducted in 2001, 2002 and 2003. App. Brief, p. 11. But there is nothing in the record to indicate that the 2001 and 2002 perc tests were conducted on the disputed land; only with respect to the 2003 perc tests did the trial court find that Mr. Callaham believes some of the perc holes were dug on the disputed land. CP 328 (finding of fact no. 9). They claim that in 2005 they cleared the land up to the fence line. App. Brief, p. 11. But although Mr. Callaham testified that clearing work was done in 2005, in his published deposition he had testified that this clearing work was conducted in connection with the digging of perc holes, which occurred no later than 2003. VRP p. 78, line 9 – p. 79, line 3; VRP p. 119, line 4 – p. 121, p. 14. The trial court entered no finding that shrubbery had been cleared in 2005; and the Callahams do not assign error to the trial court's findings. As noted above: "This court cannot add to a trial court's findings of fact

merely because a fact was testified to and was not directly contradicted by another witness." *Heriot v. Lewis*, 35 Wn.App. at 502.

Therefore, with the exception of Mr. Callaham's testimony about clearing shrubbery in 2005, which was not included in the trial court's findings, the Callahams recite no uses of the disputed land between 1997 and 2010 other than the two occasions (1998 and 2003) identified by the trial court. This is hardly a convincing scenario; in any event, it did not convince the trial court, whose findings of fact support its conclusion of law.

4. EVEN IF THE TRIAL COURT ERRED WITH RESPECT TO THE TWO ISSUES DISCUSSED ABOVE, ITS CONCLUSION THAT THE CALLAHAMS FAILED TO ESTABLISH ADVERSE POSSESSION IS SUPPORTED ALSO BY THE FACT THAT THE FENCE WAS A BARRIER FENCE, NOT A BOUNDARY FENCE, AN ISSUE NOT RAISED BY THE CALLAHAMS

Although Mrs. Young believes that the Callahams' assignment of error based on the two preceding issues is not well taken, even if the trial court had erred on both of those issues, its conclusion that the Callahams failed to establish adverse possession should be affirmed based on its reasoning that the fence was not a boundary fence. This is an issue the Callahams did not raise in their opening brief, and therefore may not raise at all. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 809.

To rise to adverse possession, the possession must be hostile to the

true owner's interest in the land. "[P]ermission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will ... operate to negate the element of hostility." *Chaplin v. Sanders*, 100 Wn.2d at 861-62. Where a fence is built for reasons unrelated to fixing a boundary line, the use of the land up to the fenceline by a neighbor "would be permissive until such time as he did something which would indicate an open and notorious hostile intent which is always necessary in order to establish title by prescription." *Hawk v. Walthew*, 184 Wash. 673, 675, 52 P.2d 1258 (1935) (internal quotation marks omitted).

In the present case, the trial court stated that one of the reasons for its conclusion that the Callahams had failed to establish adverse possession was that the fence was not built to mark a property boundary:

> [T]he uncontroverted evidence shows that Young built the fence to prevent her children and grandchildren from playing on land she considered hazardous – specifically including land that she owned where she had reason to believe a well was located. That Young's intent in building the fence was to control her children's and grandchildren's access to hazardous property, rather than to mark a property boundary, is bolstered by the likewise uncontroverted evidence that she did not at any time build a fence along the western side of her property. Young never expressed the intent to define her eastern property line by the fence [and] continued to use the disputed 11 feet by disposing of yard waste [and] picking blackberries.

CP 330 (conclusion of law no. C.1). Again, the trial court's findings support its conclusion. The court found that Young built the fence 11 feet

west of her eastern property line because she did not want her children or grandchildren to play near an abandoned well that she believed was located on the other side. CP 326-27 (finding of fact no. 5). This is further demonstrated by the fact that Young did not build a fence along the western side of her property, which for many years was also a vacant lot. CP 327 (finding of fact no. 6).

The Callahams do not assign error to this portion of the trial court's decision, and did not discuss the issue in their brief. Therefore, even if the trial court had erred with respect to the two preceding issues, its error would be harmless because its conclusion was also based on the independent reason that the fence was not a boundary fence.

5. THE TRIAL COURT'S CONCLUSION OF LAW THAT THE CALLAHAMS FAILED TO SHOW ADVERSE POSSESSION SHOULD BE AFFIRMED BASED ON THE CALLAHAMS' FAILURE TO ESTABLISH HOSTILITY AS EVIDENCED BY THEIR 2010 OFFER TO PURCHASE THE DISPUTED LAND FROM MRS. YOUNG

The trial court found that when Mrs. Young's daughter Kimberly told Mr. Callaham that her mother wanted him to move the fence to the property line, he responded that he would not do that but that he would be willing to compensate Mrs. Young for the disputed land with a payment of between $2,000 and $2,500. CP 329 (finding of fact no. 13). An act offering to purchase property is inconsistent with treating the land as

would the rightful owner. It shows that "[t]he requisite hostility was clearly absent." *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 776, 613 P.2d 1128 (1980), overruled on other grounds by *Chaplin v. Sanders*, 100 Wn.2d at 861, n. 2. *Chaplin* is not contrary. It merely stands for the rule that evidence of a claimant's subjective beliefs are not relevant to determining hostility; rather, the question is how the claimant treats the property.

> The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.

Chaplin v. Sanders, 100 Wn.2d at 860-61. Here, it is the act of offering to pay Mrs. Young for the disputed land, not Mr. Callaham's subjective belief about his interest in the land, that is relevant. One who is the true and rightful owner of land does not offer to buy that land from others. Therefore, Mr. Callaham's offer to pay Mrs. Young for the disputed land defeats the element of hostility, and is sufficient reason to affirm the trial court. Although the trial court did not expressly articulate this as a reason for its conclusion of law, this Court may affirm the trial court on a basis "which was not presented to the trial court if the record has been

sufficiently developed to fairly consider the ground." RAP 2.5(a).

F. CONCLUSION

For 13 years, the Callahams made almost no use of the disputed land. In 1998, they installed a culvert and possibly cleared shrubbery in part on the disputed land. In 2003, they dug perc holes, some of which may have been on the disputed land. There is some evidence of additional activities on their property during this time (e.g., other perc tests conducted in 2002), but not on the disputed land. In 2010, the Callahams knocked over and replaced Mrs. Young's fence. This event led to the present litigation, in which the Callahams claim that they have established adverse possession based on this paltry amount of activity.

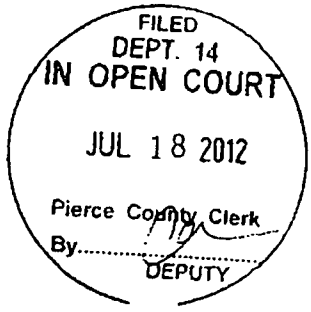
Although the Callahams do not assign error to any of the trial court's findings of fact, their brief roams through the trial transcript, deposition transcripts, and various exhibits in an effort to have this Court itself weigh the evidence and, in effect, render a judgment contrary to that of the trial court. That, of course, is not this Court's job.

DATED this 3rd day of April, 2013.

THE GILLETT LAW FIRM

Michael B. Gillett
Attorney for Respondent

APPENDIX A



IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

WILLIE E. YOUNG, a widow,

Plaintiff,

vs.

MICHAEL A. CALLAHAM and DIXIE D. CALLAHAM, husband and wife,

Defendants.

NO. 11-2-09426-5

~~[PROPOSED]~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to the Court, without a jury, on July 10, 2012. The undersigned judge presided at the trial. The claims presented at trial for adjudication were as follows:

1. Plaintiff seeks to recover damages for the removal of her fence, and reimbursement for her reasonable costs, including reasonable attorneys' fees and other litigation-related costs.

2. Plaintiff seeks to quiet title in a strip of land that is on the east side of a fence running north-south approximately 133 feet located on her property, extending approximately 11 feet to the east of the fence.

3. Defendants claim to have acquired title to the disputed property by adverse possession.

4. Defendants claim to have acquired title to the disputed property by acquiescence.

5. Defendants claim to have acquired title to the disputed property by estoppel in pais.

Plaintiff Willie E. Young appeared personally at trial and through her attorney of record, Michael B. Gillett. Defendants Michael A. Callaham and Dixie D. Callaham appeared personally at trial and through their attorney of record, Thomas A. Baldwin, Jr.

~~The witnesses, who were called and testified, at the trial are identified in the witness list attached as Exhibit A.~~ SWS

~~The exhibits, which were offered, admitted into evidence and considered by the court, are set out in the list attached as Exhibit B.~~ SWS

Based on the evidence presented at trial, the Court makes the following Findings of Fact:

I. FINDINGS OF FACT

1. Plaintiff Willie E. Young (Young) is, and at all times relevant hereto has been, the record fee title owner of that real property located in Pierce County, Washington located at 1124 121st East Street, Tacoma, Washington 98445, the legal description of which is:

> The West 231 feet of the East 331 feet (after taking exceptions) of the following described tract: Beginning at the Southwest corner of the Christopher Downey Donation Land Claim in Section 10, Township 19 North, Range 3 East of the Willamette Meridian, thence East on the South line of said Christopher Downey Donation Land Claim, 765.3 feet to center of Doyle Road for true Point of Beginning of this description; thence continuing East along said South line of Donation Land Claim, 1326 feet; thence North 161 feet to center of Allison Road; thence West along center of said Allison Road 1326 feet to center of said Doyle Road; thence South along center of said Doyle Road 132 feet to Point of Beginning. Except East 795 feet thereof, and except E. F. Allison Road.
>
> Subject to restrictions, reservations, easements, covenants, oil, gas or mineral rights of record, if any.

This property has been Young's principal residence at all times since approximately 1970.

2. On April 1, 1990, Defendants Michael A. Callaham and Dixie D. Callaham (the

SWS

Callahams) purchased that real property located in Pierce County, Washington located at 1135 122nd Street East, Tacoma, Washington 98445. This property has been the Callahams' principal residence at all times since April 1, 1990.

3. On June 19, 1997, the Callahams entered into a real estate contract for the purchase of vacant real property located north of and adjacent to their residential property, and east of and adjacent to Young's property, the legal description of which is:

> The East 100 feet (after taking exceptions) of the following described property: Commencing at the Southwest corner of the Christopher Downey Donation Land Claim in Section 10, Township 19 North, Range 3 East of the Willamette Meridian; thence East on the South line of said Downey Donation Land Claim, 765.3 feet to center of Doyle Road for true Point of Beginning of this description; thence continuing East along said South line of said Donation Land Claim, 1326 feet; thence North 161 feet to center of Allison Road; thence West along center line of said Allison Road, 1326 feet to center of said Doyle Road; thence South along center of said Doyle Road, 132 feet to Point of Beginning. Except East 795 feet thereof, and except Allison County Road.

On April 12, 2007, the Callahams were granted title to this real property by means of a Statutory Warranty Fulfillment Deed.

4. Some time before the Callahams purchased their residential property, Young had built a fence running north-south approximately 11 feet to the west of her eastern property line (i.e., the boundary between Young's residential property and the vacant property later purchased by the Callahams).

5. Young built the fence in the same location as an older fence, which had been present on the property since before Young purchased the property. She intentionally built the fence 11 feet west of the property line because she did not want her children or grandchildren to play on the empty lot, including the portion she owned, because she considered it hazardous. In particular, the previous owners of her property had told her that there was a well, which once had

been used to water livestock, just on the other side of the fence, and she could see a hole in the ground which she believed was the well about which she had been warned. The Callahams admit that they have no knowledge of the origins of the fence, why it was built, or why it was located 11 feet west of the property line.

6. Until approximately 2011, the real property located west of Young's residential property was vacant. Young did not build a fence along her western property line. In approximately 2011, the owners of the property to the west of Young's residential property built a house on the property, at which time they also built a fence along the property line dividing their property from Young's property.

7. Over the years, Young occasionally would throw grass clippings and other yard waste over the fence onto her property located east of the fence. From time to time, she would also pick blackberries from bushes growing up on either side of the fence. Although there were blackberry bushes growing over much of the vacant lot, Young did not pick berries other than those located on her property next to the fence.

8. In 1997, when the Callahams purchased the vacant lot, they did so with the intention of building a house on the property. In 1998, the Callahams hired a contractor to do some work on their vacant lot. The contractor cleared shrubbery and hauled it away, installed a culvert in a ditch running along the north side of the property, and laid quarry spalls over the culvert. Some of the removed shrubbery may have been located on Young's property east of the fence. A portion of the culvert and quarry spalls was located on Young's property east of the fence.

9. In 2002 and 2003, the Callahams had percolation tests conducted on the vacant lot, to determine if a septic system could be installed in connection with their plans to build a

residence on the property. Mr. Callaham believes that three of the perc holes dug in 2003 were located within 8 to 12 feet of Young's fence, although he did not measure the distance. The property failed the percolation tests. Thereafter, the Callahams had the intention of using the vacant lot as an extension of their back yard.

10. Satellite photographs, downloaded from Google Earth, which show both Young's residential property and the Callahams' properties in May 2005, November 2007, April 2009, and June 2010 show vegetation growing throughout the vacant lot. None of these satellite photographs show the presence on the lot of structures, equipment or vehicles of any kind. None of these satellite photographs show evidence of any human activity on the vacant lot. The Callahams did not offer any photographs, or other physical or documentary evidence, that they used the vacant lot – or, in particular the 11 feet of the vacant lot that is east of Young's fence – for any purpose after conducting the failed perc tests in 2003 until they removed Young's fence in 2010.

11. In July, 2010, the Callahams hired a contractor to clear the vacant lot of blackberry bushes and shrubbery, to lay a gravel driveway onto the vacant lot from 121st East Street, and to build a fence around the perimeter of the vacant lot, except for the boundary between the vacant lot and the Callahams' residential property. In the course of this work, the accidentally an 8 foot section of contractor knocked down Young's fence located approximately 11 feet west of the property line between Young's residential property and the Callahams' vacant lot. When this happened, Mr. told her what had happened & asked her for permission to Callaham walked over to Young's driveway, where Young happened to be standing, ~~and told her he was replacing her fence~~. replace the fence. She agreed. The Callahams' contractor completed the removal of Young's fence, and the Callahams deposited the materials on the vacant lot. The Callahams then built a new fence in approximately the same location as Young's fence had been located. They also laid

gravel across the 1998 culvert.

~~12. The evidence shows that $1,040.00 is a reasonable estimate of the amount of money it will cost Plaintiff to obtain the material to replace her fence removed by the Callahams. In addition, as a result of the Callahams' removal of her fence, Young has incurred other costs, including more than $30,000.00 in attorneys' fees and other litigation related costs.~~

13. The conversation between Young and Callaham when Young's fence was removed was the first discussion between them regarding the location of the property line. A second conversation occurred thereafter, when Young asked Callaham if he had a survey done to locate the property line, to which he replied that it wasn't a problem. Young and Callaham have not had any other communications concerning the property line. Some days, or weeks, after the second conversation, Callaham discussed the property line with Kimberley Breed, Young's daughter, who told him that her mother wanted the fence moved to the property line. Mr. Callaham told Breed that wasn't going to happen, but he told Breed he would be willing to (the 11 feet East of the fence line) compensate Young for her land with a payment of money. ($2,000 - $2,500).

14. A satellite photograph, downloaded from Google Earth, shows both Young's residential property and the Callahams' properties in August 2011. The area graveled over in 2010 is clearly visible in the photograph, and the photograph indicates that vegetation on the property was being kept cut back.

Based on the above findings, the Court makes the following Conclusions of Law.

II. CONCLUSIONS OF LAW

A. Plaintiff's Claim for Damages and Costs

Pl's claim for damages + att'y fees under RCW 4.24.630 fails because the FOF do not establish that the response to the fence occurred intentionally & unreasonably & without authorization.

1. ~~Under RCW 4.24.630, Plaintiff Willie E. Young has suffered damages by the Defendants' removal of her fence from her property, reasonably measured by the cost of~~

~~replacing that fence, which the evidence shows is in the amount of $1,040.~~

~~2. Under RCW 4.24.630, Plaintiff Willie E. Young is entitled to reimbursement from Defendants of her reasonable costs, including reasonable attorneys' fees and other litigation-related costs in an amount to be determined by this Court after Plaintiff makes an application for such costs and Defendants have an opportunity to respond to said application.~~

B. Plaintiff's Quiet Title Claim

1. Plaintiff Willie E. Young is the true title owner of the disputed land, which is that area within her legally-described property that is east of the fence (a strip of land approximately 11 feet wide and 138 feet long).

C. Defendants' Adverse Possession Counterclaim

1. Defendants Michael A. Callaham and Dixie D. Callaham have failed to show that they have acquired title by adverse possession. Since 2003, the Callahams claim to have considered the vacant lot to which the disputed property is adjacent, as part of the back yard of their residence. But they have failed to provide evidence that they maintained or used the property in the fashion of a residential back yard. Instead, such use of the property as they have provided evidence has been non-continuous and irregular. ~~The evidence instead shows that they made little if any use of the disputed land~~. Furthermore, the uncontroverted evidence shows that Young built the fence to prevent her children and grandchildren from playing on land she considered hazardous – specifically including land that she owned where she had reason to believe a well was located. That Young's intent in building the fence was to control her children's and grandchildren's access to hazardous property, rather than to mark a property boundary, is bolstered by the likewise uncontroverted evidence that she did not at any time build a fence along the western side of her property. Young never expressed the intent to define her eastern property line by the fence + instead to use the disputed 11 feet by dispersing of yard waste + picking blackberries.

D. Defendants' Acquiescence Counterclaim

1. Defendants Michael A. Callaham and Dixie D. Callaham have failed to show that they have acquired title by acquiescence. Specifically, they have not provided clear, cogent and convincing evidence that he and his neighbor recognized the fence as the true property line, as opposed to a mere barrier, for the statutory period necessary to establish adverse possession.

E. Defendants' Estoppel in Pais Counterclaim

1. Defendants Michael A. Callaham and Dixie D. Callaham have failed to show that they have acquired title by estoppel in pais. Specifically, they have not provided evidence that there was ever any admission, statement, or act by Young that is inconsistent with her ownership of the disputed land, nor that they acted on such admission, statement or act to their injury.

Therefore, it is the decision of this Court that Plaintiff Willie E. Young is entitled to a judgment quieting title to the disputed land, and to a judgment dismissing the Defendants' counterclaims for adverse possession, acquiescence and estoppel in pais. In addition, Plaintiff is ~~entitled to an award of damages under RCW 4.24.630 in the amount of $1,040.00 for the Defendants' removal of her fence, and to reimbursement of her reasonable costs, including reasonable attorneys' fees and other litigation related costs in an amount to be determined by this Court at a later date.~~

DATED this 18 day of July, 2012.

Hon. Susan K. Serko
Judge, Superior Court

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FILED
DEPT. 1
IN OPEN COURT
JUL 18 2012
Pierce County Clerk
By: DEPUTY

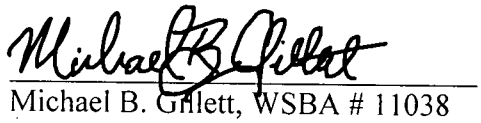
~~[Proposed] Findings of Fact and Conclusions of Law~~ - 8

Declaration of Service

I, MICHAEL B. GILLETT, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am the attorney-of-record for Respondent Willie E. Young in the above-entitled matter. I am over 18 years of age, knowledgeable of the matters stated herein, and competent to testify as to the same. On this day, I caused to be served on the persons indicated below the Brief of Respondent, via messenger service with instructions to serve not later than April 5, 2013:

Attorney for Appellants:
Thomas A. Baldwin, Jr., WSBA # 28167
Law Offices of Thomas A. Baldwin, P.S.
1002 39th Avenue S.W., Suite 205
Puyallup, WA 98373

SIGNED this 3rd day of April, 2013, at Seattle, Washington.



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